

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
BARBARA A. BARKER**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD76764

DATE: September 16, 2014

Appeal From:

Bates County Circuit Court
The Honorable James K. Journey, Judge

Appellate Judges:

Division Four: Alok Ahuja, Chief Judge, Presiding, Cynthia L. Martin, Judge and Randall R. Jackson, Special Judge

Attorneys:

Gregory L. Barnes, Jefferson City, MO, for respondent.

R. Todd Wilhelmus, Butler, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

RESPONDENT,

v.

BARBARA A. BARKER,

APPELLANT.

No. WD76764

Bates County

Before Division Four: Alok Ahuja, Chief Judge, Presiding, Cynthia L. Martin, Judge and Randall R. Jackson, Special Judge

Barbara Barker appeals her conviction following a jury trial of promoting child pornography in the second degree on a theory of accomplice liability based on her husband's possession of a specific image on the hard drive of his computer. We conclude that there was not sufficient evidence from which the jury could find Barbara guilty beyond a reasonable doubt.

REVERSE AND VACATE CONVICTION AND SENTENCE

Division Four holds:

1. The doctrine of accomplice liability comprehends any of a potentially wide variety of actions intended by an individual to assist another in criminal conduct. The evidence must establish that with the purpose to promote the offense, an accomplice aided or encouraged another person's conduct that constituted the offense. Conduct without the requisite culpable mental state is not sufficient to support a conviction.
2. Missouri cases characterize conduct coupled with the requisite *mens rea*--that is, the purpose to promote the principal's commission of a crime--as "affirmative participation."
3. Any evidence, either direct or circumstantial, that shows affirmative participation in aiding the principal to commit the crime is sufficient to support a conviction. Affirmative participation may be proven by inference.

4. The State argues that the defendant affirmatively participated in her husband's commission of the charged crime because she restored her husband's computer with knowledge that he had used his computer to view child pornography in the past. The restoration of a computer is not, however, inherently incriminating conduct, and, standing alone, permits no inference of criminal intent to aid or encourage criminal behavior. The State nonetheless argues that affirmative participation can be inferred from that conduct because the defendant had past knowledge of her husband's criminal use of his computer.

5. Though knowledge may support an inference of criminal intent, the knowledge must involve a principal's present commission, or intended future commission, of a crime.

6. The only evidence establishing that the defendant saw her husband viewing suspect images on his computer related to a period six months prior to his arrest. The defendant's conduct in restoring the computer occurred in the three to four week period immediately preceding her husband's arrest. There was no evidence about what the defendant saw when she restored the computer, or about what she specifically did in restoring to the computer. There was no evidence indicating when the pornographic image identified in the Information was placed on the hard drive of the computer, and thus no evidence that the image (or any other image) was accessed and placed on the hard drive during or after a time when the defendant restored the computer.

7. Under the circumstances of this case, it is not reasonable to infer criminal intent to aid or encourage the commission of the crime of possession of a specific pornographic image from an inference that the defendant could have known that her husband would use the computer to access child pornography. While reasonable inferences may be drawn from direct and circumstantial evidence, the inferences must be logical, reasonable and drawn from established fact. Courts will not supply missing evidence or give the state the benefit of unreasonable, speculative or forced inferences. The inference the State requires to establish Barbara's guilt beyond a reasonable doubt is based on speculation and conjecture.

Opinion by Cynthia L. Martin, Judge

September 16, 2014

This summary is UNOFFICIAL and should not be quoted or cited.